

MEMORANDUM

DATE: July 30, 2007

TO: Ms. Sharon L. Summers, DMMA
Policy and Program Development Unit

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: DSS Proposed Non-Discrimination Policy [11 DE Reg. 23 (July 1, 2007)]

The State Council for Persons with Disabilities (SCPD) reviewed the Division of Social Services (DSS) proposal to amend several regulations establishing its non-discrimination standards and processing of discrimination complaints. DSS recites that the impetus is U.S. Department of Agriculture (USDA) revisions to federal regulations which now address retaliation. Council would like to share the following observations.

First, consistent with the attached USDA nondiscrimination statement, the Division covers the same eight (8) bases contained in the USDA policy: race, color, national origin, sex, religious creed, age, disability, and political beliefs. The Division may wish to consider whether State public policy also favors supplementing this list with “sexual orientation” and/or “marital status”. For example, in the context of State employment, discrimination on such bases is prohibited. See attached Executive Order No. 86 (May 2, 2006).

Second, the Division addresses “retaliation” by simply adding it to the list of protected classes in §§9004, 1006.6, 1006.7, 1007, and 1007.3. This makes little sense. “Retaliation” is not a protected class. Rather, there should be a separate standard prohibiting retaliation against persons who file or facilitate a discrimination complaint or otherwise seek enforcement of the nondiscrimination regulations. For example, the attached USDA nondiscrimination regulation, Par. 4, identifies protected classes and then adds the following separate statement:

No person shall be subjected to reprisal or harassment because he or she filed a discrimination complaint, participated in or contributed to the identification, investigation, prosecution, or resolution of civil rights violations in or by a recipient of Federal financial assistance from USDA; or otherwise aided or supported the enforcement of Federal or USDA civil rights laws, rules, regulations, or policies.

Council suggests DSS adopt some variation of this statement in its regulations. For example, it could recite as follows:

No person shall directly or indirectly be subjected to retaliation, reprisal, or harassment because he or she has filed a discrimination complaint; participated in or contributed to the identification, investigation, or review of discrimination; or otherwise aided or supported the enforcement of nondiscrimination laws or regulations.

Third, the resolution of complaint regulation (§§1007.3) is somewhat weak. It omits any authorization to provide individual relief to the complainant. For example, if a Deaf complainant alleged that staff refused to provide an interpreter necessary to complete a benefits application, or resulting in termination of benefits due to inability to effectively communicate, the regulation would not authorize an individual remedy (e.g. retroactive approval or reinstatement of benefits). By analogy, the DSS fair hearing regulation [§5501] explicitly authorizes corrective relief. At a minimum, §1007.3 would benefit from a similar authorization.

Fourth, §1006.6 contemplates publication of the Division's nondiscrimination policy through the media (television, radio, newspaper). Council suggests this information also be published on the Division's website.

Fifth, §1006.3 contemplates the availability of multiple complaint options (federal and state) for an alleged victim of discrimination. For example, there may be circumstances in which an applicant or recipient could either file a complaint under §1007.1 or request a fair hearing under 16 Admin Code 5001. As noted above, a Deaf person wrongly denied an interpreter (violating the ADA) may be improperly denied benefits or have benefits terminated. Alternatively, a DSS employee could refuse to provide a reasonable accommodation to a person with a disability resulting in a denied application, termination of benefits, delay in receipt of benefits, or reduction in benefits. It would be preferable to add a non-supplanting provision to §1007.1. Cf. the Department of Education federal programs complaints regulation, 7 DE Reg. 188, 190, final footnote (August 1, 2003). The following paragraph could be added to §1007.1:

The right to file a complaint under this section is not intended to be an exclusive remedy or supplant resort to other review systems which may otherwise be available, including 16 Admin Code 5000.

Thank you for your consideration; and please contact SCPD if you have any questions or comments regarding our observations on the final regulation.

Cc: Mr. Harry Hill, DMMA Director
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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